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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 1010

GEORGE NELSON, MRS. AGNES NELSON, AND MRS. OLLIE HALPIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (R. 141–143) is not reported. The opinion of the Circuit Court of Appeals (R. 157–162) is reported in 139 F. 2d 162.

JURISDICTION

Judgment of the Circuit Court of Appeals was entered on November 23, 1943. (R. 162.) A petition for rehearing was denied by order of that Court on January 18, 1944. (R. 163.) On March 27, 1944, the time for filing petition for certiorari in this case was extended to and including May 19, 1944. The petition for writ of certiorari was

filed on May 18, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Government's lien under Section 3670 of the Internal Revenue Code on taxpayer's grape crop for income taxes, prior in point of time by virtue of a similar lien on the farm where such grapes were grown, is superior to a claim advanced by taxpayers' assignee of the proceeds from the sale of such grapes.

STATUTES INVOLVED

Revised Statutes:

> SEC. 3186. (a) [As amended by Section 613 (a) of the Revenue Act of 1928, c. 852, 45 Stat. 791] If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. * * *

This section is now codified as Section 3670 of the Internal Revenue Code.

Internal Revenue Code:

> SEC. 3690. AUTHORITY TO DISTRAIN.
>
> If any person liable to pay any taxes neglects or refuses to pay the same within

ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with such interest and other additional amounts as are required by law, by distraint and sale, in the manner provided in this subchapter, of the goods, chattels, or effects, including stocks, securities, bank accounts, and evidences of debt, of the person delinquent as aforesaid. (26 U. S. C. 1940 ed., Sec. 3690.)

SEC. 3692. LEVY.

In case of neglect or refusal under Section 3690, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the lien provided in Section 3670 exists, for the payment of the sum due, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy. (26 U. S. C. 1940 ed., Sec. 3692.)

SEC. 3710. SURRENDER OF PROPERTY SUBJECT TO DISTRAINT.

(a) *Requirement.*—Any person in possession of property, or rights to property, subject to distraint, upon which a levy has been made, shall, upon demand by the collector or deputy collector making such levy, surrender such property or rights to such collector or deputy, unless such property or right is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) *Penalty for Violation.*—Any person who fails or refuses to so surrender any of such property or rights shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes (including penalties and interest) for the collection of which such levy has been made, together with costs and interest from the date of such levy.

(c) *Person Defined.*—The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs. (26 U. S. C. 1940 ed., Sec. 3710.)

STATEMENT

The National Wine Company, herein referred to as Wine Company, is a corporation organized under the laws of the State of Washington, with its principal place of business within the Western Federal Judicial District of that state. George Nelson and his wife, Agnes Nelson, herein referred to as taxpayers, and Mrs. Ollie Halpin, herein referred to as Halpin, are individual residents of Seattle, King County, Washington, and within the Western Federal Judicial District of that state. (R. 37.)

On September 24, 1937, taxes were assessed against George Nelson and Agnes Nelson in the total amounts of $2,840.12 and $2,664.22, respectively, on their income of 1933 and 1934. Through instalment payments and credits these amounts, plus accrued interest, have now been reduced to $667.03 in the case of George Nelson, and $1,173.75 in the case of Agnes Nelson. These latter amounts, plus interest and costs, are now due and owing from these taxpayers. (R. 38–39.)

For failure to pay these income taxes, on November 2, 1937, the Collector issued warrants for distraint. On July 29, 1938, and on April 22, 1939, notices of tax liens were filed with the auditors of King County and Yakima County, Washington, respectively. Similiar notices were filed with the Clerk of the United States District Courts at Tacoma and at Spokane, Washington, on August 1, 1938, and on April 22, 1939, respectively. (R. 39–40.)

The taxpayers are the owners of a farm located in Yakima County, Washington. During 1940 they raised a crop of grapes on this farm. By contract dated August 19, 1940, these grapes were sold to the Wine Company, under which contract there became due and owing from the company $2,999.49. (R. 40.)

On October 14, 1940, George Nelson allegedly assigned to Halpin the claim against the Wine

Company for payment of the purchase price of the 1940 grape crop. This assignment was accepted by the Wine Company on the same date. (R. 41.)

On October 25, 1940, the Collector caused to be served on the Wine Company notices of levy and copies of notices of the tax liens and warrants for distraint with respect to the taxes here involved. These notices not having been complied with, on January 14, 1941, the Collector caused to be served on the Wine Company final notices and demands with respect to these taxes. (R. 40.)

The present action was commenced on June 17, 1943, against the Wine Company under the provisions of Section 3710 of the Internal Revenue Code with respect to the collection of the taxes here involved (R. 2–5). On motion of the Wine Company, the taxpayers and Halpin were interpleaded as additional defendants (R. 8–9). A motion was made by the Government to strike the answer and counterclaim for interpleader filed by these additional defendants. One ground for this motion was that these additional defendants had no interest in this action. (R. 22–24.) The record does not contain any order by the lower court on this latter motion.

The District Court held the lien of the Government to be superior to any claim advanced by Halpin as assignee (R. 141–143). By its judgment, the District Court ordered that the Wine Company pay into court the $2,999.49 owed by it

for the purchase of taxpayers' 1940 grape crop; that the claim of the Government for the unpaid taxes here involved be satisfied out of this amount; and that, if any excess exists, it be distributed between the taxpayers and Halpin as they may by writing agree (R. 44–46).

On appeal to the Circuit Court of Appeals for the Ninth Circuit by the taxpayers and Halpin, the decision of the District Court was affirmed (R. 157–162). The Wine Company did not join in this appeal.

The Wine Company is not a party to this petition for certiorari.

ARGUMENT

1. This proceeding was instituted by the United States under Section 3710 of the Internal Revenue Code against the Wine Company to compel that company to surrender amounts due under a contract between the taxpayers and the Wine Company for the purchase of their 1940 grape crop. Over the objection of the Government (R. 23–24) the taxpayers and Halpin, to whom their claim against the Wine Company was alleged to have been assigned by the taxpayers, became additional defendants by order of the District Court (R. 8–9) and are the only petitioners here.[1]

[1] While it does not appear in this record, after judgment of the Circuit Court of Appeals in this matter, the amount involved, namely $2,999.49, was paid by the Wine Company to the District Court for distribution in accordance with the judgment of that Court.

The petitioners make no contention that the court below erred in construing any of the federal statutes that determine the rights of the Government to the fund here involved. The Government's claim to this fund has priority by virtue of the application of its lien under Section 3670 of the Internal Revenue Code as follows: To the taxpayers' farm prior to 1940; to the grape crop grown on this farm during 1940; and to the proceeds from the sale of the grape crop to the Wine Company by contract of August 19, 1940 (R. 40).[2] It will be noted that the interest of Halpin in this fund did not arise until October 14, 1940, when the taxpayers allegedly assigned to her their claim against the Wine Company for payment of the purchase price of the 1940 grape crop (R. 41).

The decision of the court below correctly gave effect to the Government's priority.

2. The principal contention raised by this petition seems to be that, by virtue of an earlier attempt to collect the taxes here involved out of taxpayers' interest in a defunct partnership, the

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[2] The application of the Government's lien under Section 3670 of the Internal Revenue Code to after-acquired property was sustained by the Circuit Court of Appeals for the Ninth Circuit in *Citizens Nat. Trust & S. Bank of Los Angeles* v. *United States*, 135 F. 2d 527. See also *United States* v. *Warren R. Co.*, 127 F. 2d 134 (C. C. A. 2d); *United States* v. *Canfield*, 29 F. Supp. 734 (S. D. Calif.).

Government is restricted to taxpayer's interest in those assets and is precluded from collecting the taxes out of the proceeds from the contract with the Wine Company.

It appears from the testimony that during or prior to 1938, a partnership of which George Nelson was a member was placed in receivership for the benefit of creditors under the jurisdiction of the Superior Court for King County, Washington (R. 95, 122, 134). On December 13, 1938, George Nelson executed an assignment and order on the receiver of this partnership for the payment to the Collector of his taxes and those of his wife (R. 95). On the basis of this assignment and its statutory priorities, the Government filed an interpleader action in the state court for the collection of the taxes here involved out of that portion of the partnership's assets to which George Nelson was entitled (R. 107). From this action, there was realized by the Government $1,334.06, which on March 20, 1940, was credited equally to the unpaid taxes of George Nelson and Agnes Nelson in the amounts of $667.03 each (R. 98).

The Government is not restricted to any one of several funds belonging to a taxpayer in the collection of taxes. The following statement was made by the court in *United States* v. *Curry,* 201 Fed. 371, 373 (Md.):

> First, it is said that, before resort to the sale of real estate owned by a delinquent

> taxpayer can be had, proceedings should be taken to recover the amount due the United States from the sale of the chattels and personal effects of such delinquents under sections 3187 to 3196 of the Revised Statutes (U. S. Comp. St. 1901, pp. 2073–2077). This objection is completely answered by the cases of *Mansfield* v. *Excelsior Refining Co.*, 135 U. S. 326, 10 Sup. Ct. 825, 34 L. Ed. 162, and by *Blacklock* v. *United States*, 208 U. S. 75, 28 Sup. Ct. 228, 52 L. Ed. 396.

The petitioners urge, in substance, that the Government officials contracted to collect the tax here involved only from the receiver of the defunct partnership. The District Court made no finding of such a contract, the officials in question were not authorized to enter into such a contract, and in no event would such a contract be binding on the United States.

3. The petitioners have not outlined the basis of this Court's jurisdiction or enumerated the questions presented, as required by Rule 38. Their so-called "Transcript of Record" advances no contention that the decision of the Circuit Court of Appeals in this case is in conflict with a decision of any other Circuit Court of Appeals or with a decision of this Court. There is no showing that the question presented is an important question of federal law which has not been but should be settled by this Court.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
HELEN R. CARLOSS,
T. CARROLL SIZER,
Special Assistants to the Attorney General.

MAY, 1944.

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